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Mervyn Piesse
Senate Standing Committee on Legal and Constitutional Affairs
By email: legcon.sen@aph.gov.au

Re: Inquiry into Whistleblower Protection Authority Bill 2025 (Written questions on notice for the Centre for Public Integrity from Senator Jana Stewart)

Dear Mervyn,

We write in response to the following written question on notice from Senator Jana Stewart:

Does the Centre for Public Integrity share the concerns raised by the Commonwealth Ombudsman and the Australian Human Rights Commission that the Bill has the potential to create perceived or actual conflicts of interest given both the oversight role and the role of delivery of legal advice by the Whistleblower Protection Authority?

The CPI makes three points in response:

1. The CPI supports the establishment of an independent whistleblower authority in the form of a Whistleblowing Protection Commissioner, as a key structural reform designed to improve the operation of the federal public interest disclosure regime. As such, the CPI supports the objective of the Whistleblower Protection Authority Bill 2025.
2. The CPI has previously argued that the Whistleblowing Protection Commissioner must be carefully designed so that it is provided with the necessary independence it requires to fulfil its function, and sufficient budgetary resources to operate effectively. Further, it should be designed so as to complement and support the work of other bodies that already have responsibilities under the *Public Interest Disclosure Act 2013*, in particular the

Commonwealth Ombudsman. We **attach** our December 2023 submission setting out our position in this respect.

3. We have previously argued that a Whistleblowing Protection Commissioner should have the following functions:

- advising, assisting and guiding prospective disclosers of wrongdoing;
- receiving disclosures and protecting the identities and confidentiality of disclosers to the greatest extent possible and appropriate;
- allocating disclosures to appropriate Commonwealth agencies;
- monitoring and assisting agencies and bodies to whom disclosures of wrongdoing have been allocated;
- overseeing the way in which Commonwealth agencies investigate or otherwise deal with disclosures of wrongdoing;
- investigating and reporting on relevant reprisals, detrimental action, or failure to prevent detrimental action; and
- supporting disclosers, including by initiating court action or applying to industrial, civil or administrative bodies in order to enforce their entitlements to protection.

Many of these functions are found in the proposed functions for the Whistleblower Protection Commissioner in the Whistleblower Protection Authority Bill 2025, and in particular as outlined in cl 10.

We do, however, hold reservations in relation to the function set out in clause 10(n) in so far as it relates to the provision of legal advice or representation to persons who make disclosures of wrongdoing and who are, or may become, a party to proceedings in a court or to a matter before an industrial, civil or administrative body, under any law, if the Commissioner considers that representing the person will promote compliance with whistleblower protection responsibilities. This is expanded in clause 36(3), where it is further caveated by the following:

‘if the Commissioner considers that representing or providing advice or support to the person will promote compliance with whistleblower protection responsibilities, and is appropriate in all the circumstances.’

As identified in the submissions of both the Commonwealth Ombudsman and the Australian Human Rights Commission, this creates a possible conflict of interest, particularly if the Whistleblower Protection Commissioner is also involved in the matter as an independent monitor, investigator or a mediator.

It might be that the caveat that requires the Whistleblower Protection Commissioner to view the provision of advice or support as ‘appropriate in all the circumstances’ is sufficient to address these potential conflicts of interest in any individual matter.

However, a better solution to this situation is that the Whistleblower Protection Commissioner provide support other than in the direct provision of legal advice or representation, including for instance arranging for the persons who make disclosures to access legal advice and representation from another party, and or providing financial assistance to do so, as is contemplated in clause 36(4) and (5).

About The Centre for Public Integrity

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Further Reforms to Public Sector Whistleblowing

Submission

December 2023

The Centre for Public Integrity welcomes the opportunity to make a submission on the second stage of public sector whistleblowing reform.

We are a non-partisan think tank led by integrity experts from academia, public policy, and the judiciary.

Encouraging people to disclose wrongdoing occurring in the public sector, and protecting those who do, is essential to ensuring our executive is at all times accountable and operating in the interests of the public.

Whilst acknowledging the improvements to the federal public sector whistleblowing framework secured through the passage of the *Public Interest Disclosure Amendment (Review) Act 2023* earlier this year, we consider that reform at the structural level remains necessary — most pressing is the need for an independent whistleblower protection authority.

Our submission focusses on this central area of reform and offers suggestions as to how such an authority could be established.

We would be pleased to provide any further assistance that may be required in respect of these reforms.

Yours sincerely,

Dr Catherine Williams
Executive Director

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Research Officer

An independent whistleblower protection authority

Support for an authority dedicated entirely to whistleblowing pre-dates the enactment of the *Public Interest Disclosure Act 2013* (Cth) (**PID Act**) itself. A report tabled by the Senate Select Committee on Public Interest Whistleblowing in 1994 envisaged the establishment of a ‘small but powerful independent agency’.¹ This vision was expanded upon by the Parliamentary Joint Committee on Corporations and Financial Services, which in 2017 recommended the establishment of a Whistleblower Protection Authority.²

There is no shortage of precedents for such an authority internationally. The United States and Canada, for instance, both have dedicated authorities for whistleblowing in the form of the Office of the Special Counsel and the Office of the Public Sector Integrity Commissioner respectively.

The Commonwealth, which was in fact the last Australian jurisdiction to legislate a protection regime for whistleblowers in its public sector, now has an opportunity to take a leading role by pioneering the long called-for independent whistleblower authority.

Housing the authority

The independent whistleblower authority, provided it is indeed independent, could be a standalone body or co-located within an existing body. Irrespective of the model adopted, it is imperative that the authority be afforded sufficient budgetary resources to operate effectively.³ Any additional administrative and operational costs associated with its establishment could, however, be minimised by co-locating it within an established body with existing accountability functions.

There is a range of federal agencies that may constitute appropriate bodies in which to house the dedicated whistleblower authority. The National Anti-Corruption Commission (NACC) is one such agency which, in the months leading up to its establishment, we supported as a suitable candidate. This structure reflects the models that members of the crossbench, namely, Cathy McGowan

¹ Senate Select Committee on Public Interest Whistleblowing, Parliament of Australia, *In the Public Interest* (Report, 1994) 107
<https://parlinfo.aph.gov.au/parlInfo/download/publications/tables/papers/HPP032016005056/upload_p df/HPP032016005056.pdf;fileType=application%2Fpdf#search=%22publications/tables/papers/HPP032016005056%22>.

² Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Whistleblower Protections* (Report, 2017) 157
<https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/WhistleblowerProtections/Report>.

³ Organization for Economic Development, *Committing to Effective Whistleblower Protection* (Report, 2016) 85.

MP,⁴ Senator Larissa Waters⁵ and Dr Helen Haines MP, proposed in their Bills seeking to establish a National Integrity Commission.⁶

Whilst the NACC remains a worthy option, given its only recent establishment, we propose that in the alternative the authority reside within the Office of the Commonwealth Ombudsman (**Ombudsman**).

The role of the Ombudsman

The existing oversight of the whistleblowing regime provided by the Ombudsman has only expanded as a result of recent amendments to the PID Act, making it a prime candidate in which to house the whistleblower authority.

The Ombudsman plays a distinctive role in the procedures for making public interest disclosures. For example, its officers constitute authorised internal recipients to whom,⁷ in certain circumstances, internal disclosures may be made under s 26.⁸ Disclosures may also be allocated to it for handling, under s 43, and investigation under s 47. It also has investigatory powers under its own Act which may be used to investigate disclosures.⁹

The recent expansion of the role of the Ombudsman under the PID Act includes the introduction of s 55, which gives it power to review decisions to allocate or investigate disclosures and make recommendations to principal officers.¹⁰ Where it makes a recommendation about the allocation of a disclosure, authorised officers are required to have regard to this when making the decision as to allocation.¹¹

In addition to dealing with public interest disclosures, the functions of the Ombudsman under the PID Act include reporting and education. Agencies are required to notify it of certain decisions to (or not to) allocate or investigate disclosures.¹² As a consequence of the reforms of July 2023, agencies are now also required to, within a reasonable time, notify the Ombudsman of the completion of an investigation and provide it with an investigation report.¹³ The Ombudsman itself

⁴ National Integrity Commission Bill 2018 (Cth).

⁵ National Integrity Commission Bill 2018 (Cth).

⁶ Australian Federal Integrity Commission Bill 2021 (Cth).

⁷ As well as those of the Inspector-General of Intelligence and Security.

⁸ Whether authorised officers of the Ombudsman are authorised internal disclosers depends on the discloser believing on reasonable grounds that it would be appropriate for the disclosure to be investigated by the Ombudsman: s 34.

Authorised officers of the Ombudsman are *not* an authorised internal recipient of disclosures which it would be appropriate for the Inspector-General of Intelligence and Security which relate to action taken by the ACIC or AFP in relation to their intelligence functions: s 34.

⁹ *Public Interest Disclosure Act 2013* (Cth) s 49.

¹⁰ *Public Interest Disclosure Act 2013* (Cth) s 55.

¹¹ *Public Interest Disclosure Act 2013* (Cth) s 43(5)(b)(ii).

¹² *Public Interest Disclosure Act 2013* (Cth) ss 44, 44A(3), 44B(2), 50A.

¹³ *Public Interest Disclosure Act 2013* (Cth) s 51(4)(b).

provides annual reports to Parliament on the operation of the PID Act at the end of every financial year,¹⁴ and, as a result of recent amendments, six-monthly reports at the end of every calendar year.¹⁵ Moreover, it provides education in respect of the PID Act,¹⁶ assists agencies in relation to its operation,¹⁷ and has the power to set standards on a range of matters¹⁸ with which agencies' procedures for facilitating and dealing with disclosures must comply.¹⁹

The potential for the institution of the Ombudsman to play an enhanced role in the whistleblowing framework is also gaining traction at state level. In Queensland, the report of an independent review into the *Public Interest Disclosure Act 2010* (Qld) recommended that a whistleblower support unit, tasked with giving assistance and advice, be established within the Office of the Queensland Ombudsman.²⁰

Whistleblowing Protection Commissioner

We submit that the independent whistleblower authority should take the form of a Whistleblowing Protection Commissioner.

This office could be occupied by the Ombudsman performing a dual role, as for example, in Canada, where the Ombudsman of Alberta is simultaneously the Public Interest Commissioner.²¹

Alternatively, the office could be occupied by an additional person within the office of the Ombudsman. One example of the multiple Commissioner approach is the structure of the Office of the Australian Information Commissioner, which houses a Privacy Commissioner, Freedom of Information Commissioner and Information Commissioner.

Importantly, the key functions which should be conferred upon the Whistleblowing Protection Commissioner either reflect or would serve as a complement to the functions of the Ombudsman. Placing a Commissioner within that office would provide an immediate infrastructure, including access to skilled investigators. In this way, additional costs may be minimised and existing learnings and knowledge utilised. As proposed by the aforementioned crossbench Bills, these functions include:

¹⁴ *Public Interest Disclosure Act 2013* (Cth) s 76.

¹⁵ *Public Interest Disclosure Act 2013* (Cth) s 76A.

¹⁶ *Public Interest Disclosure Act 2013* (Cth) s 62(b).

¹⁷ *Public Interest Disclosure Act 2013* (Cth) s 62(a).

¹⁸ *Public Interest Disclosure Act 2013* (Cth) s 74(1);

¹⁹ *Public Interest Disclosure Act 2013* (Cth) s 59(4)(c).

²⁰ *Review of the Public Interest Disclosure Act 2010* (Report, June 2023) 8.

²¹ 'Kevin Brezinski takes the helm as Alberta's new Ombudsman and Public Interest Commissioner', *International Ombudsman Institute* (Web Page, 01 February 2023) <<https://www.theioi.org/ioi-news/current-news/kevin-brezinski-takes-the-helm-as-alberta-s-new-ombudsman-and-public-interest-commissioner>>.

- advising, assisting and guiding prospective disclosers of wrongdoing;
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- investigating and reporting on relevant reprisals, detrimental action, or failure to prevent detrimental action; and
- supporting disclosers, including by initiating court action or applying to industrial, civil or administrative bodies in order to enforce their entitlements to protection.²²

The Whistleblowing Protection Commissioner should also have the power to administer a whistleblower reward scheme of the kind recommended by Transparency International Australia and the Human Rights Law Centre.²³ Such a scheme is necessary to ensure that those with genuine wrongdoing to disclose are incentivised, as they should be, to do so.

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²² National Integrity Commission Bill 2018 (Cth) cl 14; National Integrity Commission Bill (No 2) 2018 (Cth) cl 14; Australian Federal Integrity Commission Bill 2020 (Cth) cl 14.

²³ AJ Brown & Kieran Pender, *Protecting Australia's Whistleblowers: The Federal Roadmap* (2022) Griffith University, Human Rights Law Centre, Transparency International <
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